

## BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	
Opinion Requested by:	)	No. 78-008-B
James L. Evans,	)	Nov. 8, 1978
United Transportation Union	)	
	)	

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BY THE COMMISSION: James L. Evans, lobbyist for the United Transportation Union, has asked the following questions concerning whether lobbying activity in connection with certain Public Utilities Commission proceedings is reportable pursuant to Chapter 6 of the Political Reform Act.

Mr. Evans asks:

(1) Whether certain proceedings of the Public Utilities Commission are quasi-legislative and, therefore, "administrative action" within the meaning of Government Code Section 82002. Specifically, Mr. Evans asks, first, whether a proceeding to determine whether Southern Pacific Transportation Company may discontinue passenger rail service between San Francisco and San Jose is quasi-legislative and, second, whether a proceeding to determine whether Airporttransit may provide passenger service between Los Angeles International Airport, Orange County and the Los Angeles Harbor area is quasi-legislative.

(2) Whether the Public Utilities Commission proceeding carried out pursuant to an Order Instituting Investigation and examining Southern Pacific commuter rail service is "administrative action."

(3) Whether the Southern Pacific discontinuance proceedings become "administrative action" when they are combined with the proceedings examining Southern Pacific commuter service held pursuant to the Order Instituting Investigation.

### CONCLUSION

(1) Neither the Southern Pacific nor Airporttransit proceedings before the Public Utilities Commission are administrative actions within the meaning of Government Code Section 82002 of the Political Reform Act.

(2) Under the circumstances presented here, the Public Utilities Commission proceedings pursuant to an Order Instituting Investigation and examining Southern Pacific commuter service is an administrative action within the meaning of Government Code Section 82002 of the Political Reform Act.

(3) Under the circumstances presented here, when the discontinuance proceedings are combined with the proceedings pursuant to the Order Instituting Investigation, the discontinuance proceeding constitutes "administrative action."

### ANALYSIS

(1) Persons who make payments to influence legislative or administrative action of \$250 a month are required, under the Political Reform Act, to file reports disclosing, among other things, the legislative or administrative action the person sought to influence and payments made to influence legislative or administrative action. Government Code Sections 86108(b), 86109.<sup>1/</sup> If a person influences government actions which are not legislative or administrative actions, he will incur no filing obligation under Section 86108(b). Furthermore, even if a person has a filing obligation under that section, he is not required to disclose payments to influence those government actions which are not administrative or legislative actions.

The question we face here is whether two specific proceedings before the Public Utilities Commission ("PUC") are legislative or administrative actions for purposes of

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<sup>1/</sup> All statutory references are to the Government Code unless otherwise noted.

the reporting requirements of Section 86108(b) and 86109.<sup>2/</sup> Section 82037 defines "legislative action" in the following manner:

"Legislative action" means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. "Legislative action" also means the action of the Governor in approving or vetoing any bill.

Under this definition, any action by the PUC clearly is not legislative action.

The Act also defines "administrative action." That definition states:

"Administrative action" means the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 4.5 of Division 3 of Title 2 of the Government Code (beginning with Section 11371).

Section 82002.

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<sup>2/</sup> Although the question in this case arises in the context of persons required to file pursuant to Section 86108(b), the analysis is equally applicable to lobbyists required to file under Section 86107 and lobbyist employers required to file under Section 86108(a). A person only becomes a lobbyist if his communications are "for the purpose of influencing legislative or administrative action." Section 82039. And like Section 86108(b) filers, a lobbyist must disclose legislative and administrative actions he has sought to influence as well as payments received in connection with influencing legislative or administrative action. Section 86107. Lobbyist employers are required to disclose, pursuant to Section 86109, the same information as Section 86108(b) filers. However, disclosure by lobbyist employers is tied to the activities of the lobbyist who is employed. 2 Cal. Adm. Code Section 18600(b). See analysis of question 4, in Opinion requested by James L. Evans, 4 FPPC Opinions 54 (No. 78-008-A, Oct. 3, 1978).

Both the Southern Pacific application to discontinue service and the Airporttransit application to commence service are made pursuant to the PUC's authority to issue operating certificates if the public convenience and necessity so demand. Public Utilities Code Section 1001, et seq. In the Southern Pacific application, the question before the PUC is whether the public convenience and necessity permit discontinuance of commuter train service between San Jose and San Francisco. In the Airporttransit application, the question before the PUC is whether the public convenience and necessity require coach service between Los Angeles airport, the Los Angeles Harbor area and Orange County.

Neither of the PUC proceedings at issue here can be described as ones which involve rules or regulations. Section 11371(b) defines a regulation as a:

...rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it...

Neither of the proceedings involves a regulation, order or standard of general application. The decision concerning Southern Pacific commuter service will apply only to Southern Pacific and not all other railroads or all other commuter railroads. Similarly, the Airporttransit proceeding will apply only to Airporttransit and not other passenger carriers. Both the Southern Pacific and Airporttransit decisions may ultimately have a large impact upon the many people who now or would in the future utilize Southern Pacific's trains and Airporttransit's coaches. But the fact that a decision may affect many people does not make it one of general application. Faulkner v. California Toll Bridge Authority, 40 Cal. 2d 317 (1953).<sup>2/</sup>

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<sup>3/</sup> In the Faulkner case the plaintiff claimed a decision approving construction of a particular bridge was a regulation because the collection of tolls on the bridge would be of general application. However, the court rejected this argument holding the decision concerning the one bridge was not a regulation of general application. 40 Cal. 2d at 323-24.

Nor can it be said that either of the proceedings are ones which involve rate-making or are governed by Chapter 4.5 of Division 3 of Title 2 of the Government Code. These proceedings do not involve the setting of rates, but rather involve authorizations to provide service. As we understand the procedures of the PUC, rates for services are usually set in proceedings separate from those in which decisions concerning service authorizations are made. In addition, PUC proceedings are not subject to Chapter 4.5 of Division 3 of Title 2 of the Government Code. That chapter deals with administrative procedure, but the PUC is authorized to establish its own procedures. Section 11445; Public Utilities Code Section 1701; People v. Western Airlines, Inc., 42 Cal. 2d 621 (1954).

The question remains as to whether the two certificate proceedings are quasi-legislative proceedings and therefore administrative action for purposes of the Act.

The line drawn by the Act's definition of administrative action appears to be the line traditionally drawn by the courts and legislative bodies between actions of administrative agencies which are quasi-legislative in nature and those which are quasi-judicial.<sup>4/</sup> Although this line was not developed for purposes of disclosure of the lobbying activity regulated by the Act, it is a line which has a long history and is generally understood.

Proceedings such as the certification proceedings traditionally have been considered to be quasi-judicial in nature. For example, in the federal system, Interstate Commerce Commission decisions on certificates of convenience and necessity are deemed to be "orders," the equivalent of quasi-judicial decisions. 5 U.S.C. Section 551; Chemical Leaman Tank Lines, Inc., v. United States, 368 F. Supp. 925 (1973). A PUC decision as to a certificate of convenience and necessity is most closely analagous to a license or permit proceeding. In permit or licensing proceedings, the rights, duties or obligations of a single person or entity is at stake and no decision of general application is made.

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<sup>4/</sup> The determination as to whether an administrative decision is quasi-judicial or quasi-legislative will determine, in part, the standards for judicial review of that decision and the procedure to be followed in making the decision.

Permit and licensing decisions have been considered to be quasi-judicial ones because they most often involve application of a general standard to a particular set of facts presented by an individual applicant. In this respect, such proceedings most resemble the decision-making processes of courts rather than legislative bodies. Faulkner v. California Toll Bridge Authority, *supra*; State v. Superior Court, 12 Cal. 3d 237 (1974) (exemption from coastal permit requirement); Topanga Association For A Scenic Community v. County of Los Angeles, 11 Cal. 3d 506 (1974) (zoning variance); Selby Realty Co. v. City of Buenaventura, 10 Cal. 3d 110 (1973) (building permit); Scott v. City of Indian Wells, 6 Cal. 3d 541 (1972) (conditional use permit); City of Coronado v. California Coastal Zone Conservation Com., 69 Cal. App. 3d 570 (1977) (coastal use permit); McMillan v. American Gen. Fin. Corp., 60 Cal. App. 3d 175 (1976) (tentative subdivision map approval); Giannini Controls Corp. v. Superior Court, 240 Cal. App. 2d 142 (1966) (corporate securities permit); Kleps, Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions - 1949-1959, 12 Stan L. Rev. 554 (1960). By regulation the Commission has previously determined that proceedings concerning issuance, amendment or revocation of licenses, permits, and entitlements for use do not constitute administrative action. 2 Cal. Adm. Code Section 18202. By enacting that regulation the Commission has acceded to the court's characterization of such decisions as quasi-judicial and not quasi-legislative. Although not denominated as an entitlement, license or permit proceedings, PUC certificate proceedings are so closely analagous to entitlement, license and permit proceedings that we conclude that, under the terms of 2 Cal. Adm. Code Section 18202, they do not constitute administrative action.

We reach the same result by analyzing the judicial standards for distinguishing between proceedings that are quasi-legislative and those that are quasi-judicial. Various formulations of the dividing line between quasi-judicial and quasi-legislative action have been postulated by the courts. In Strumsky v. San Diego County Employees Retirement Assn., 11 Cal. 3d 28 (1974) the court described the dividing line as follows:

Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.

11 Cal. 3d at 35, n.2; see also City of Coronado v. California Coastal Zone Conservation Com., *supra*, at 574.

Application of the Strumsky formulation would result in our holding that the certificate proceedings of the PUC are quasi-judicial in nature. The legislative action occurred when the Legislature adopted the various Public Utilities Code sections authorizing the PUC to grant operating permission to public utilities if the public convenience and necessity would be served by the grant.<sup>5/</sup> In adopting those authorizing sections, the Legislature set out a general rule of convenience and necessity to be applied in all future cases. The adjudicatory or quasi-judicial action occurs when the general rule, the convenience and necessity test, is applied to the specific facts brought before the PUC by a person or corporation seeking to obtain or relinquish an operating certificate.

In Hubbs v. People ex rel. Dept. of Public Works, 36 Cal. App. 3d 1005, 112 Cal. Rptr. 197 (1974) the court formulated the rule as follows:

Generally, acts constituting a declaration of public purpose and making provision for ways and means of its accomplishment are classified as calling for the exercise of legislative power. [citations] On the other hand, acts which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body ... are deemed as acts of administration....

36 Cal. App. 3d at 1008-09

Applying the Hubbs formulation to the certificate proceedings, it could be concluded that they are quasi-legislative. The broad discretionary standard for deciding whether a certificate should be granted -- whether the public convenience and necessity justifies a grant of a certificate -- clearly involves a declaration of public purpose. And the various terms and conditions of a certificate provide the means for accomplishment of the public purpose.

While it would be possible to follow the Hubbs rationale literally, we believe the better standard is the one set out in Strumsky. The Hubbs standard could result in a characterization of many administrative decisions as ones

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<sup>5/</sup> See Public Utilities Code Sections 1001-74.

which are quasi-legislative. Under a literal application of the Hubbs formulation, any administrative agency decision made pursuant to broad statutory authority which requires taking into account some aspect of the public interest could be denominated as quasi-legislative. For example, under the former Coastal Act (Pub. Res. Code Sections 27400, et seq.) the Coastal Commissions had very broad discretion to determine whether or not a development permit should be granted in any particular case and each decision necessarily involved a determination as to whether the public interest would be served by the grant or denial of a permit. Under the Hubbs formulation, those individual permit decisions would be quasi-legislative.

We do not believe the Hubbs formulation was intended to reach so broadly, nor have the courts ever characterized individualized administrative decisions involving entitlements to use or engage in an activity as quasi-legislative even in those cases where the entitlement decision was based on a broad statutory standard requiring the agency to take account of the public interest. Although the standards to be applied to some entitlement decisions are quite broad, those decisions still involve application of a previously promulgated standard to a particular set of facts raised by an individual's request for an entitlement. For that reason, the courts analogize those decisions to the role courts play and characterize them as quasi-judicial and not quasi-legislative. See e.g. Davis v. California Coastal Zone Conservation Commission, supra., at 706-07, where the court held Coastal Commission permit decisions to be quasi-judicial despite the broad discretion granted to the Coastal Commissions on permit issues. In addition, a literal application of the Hubbs rule would result in extension of disclosure to many administrative decisions involving only a single applicant. As we point out below, we do not believe that the Act was intended to extend so far.

We have considered the possibility that we should interpret the term "quasi-legislative" more broadly for purposes of the Act than have the courts for purposes of determining administrative procedures and standards of review of agency decisions. While such an expansive reading of Section 82002 would result in disclosure concerning a wider range of administrative agency decisions, we do not believe the Act was intended to extend so far. Extension of the Act's definition of quasi-legislative action to include administrative decisions such as PUC certificate decisions made under a broad discretionary standard would result in

disclosure in situations where we do not believe disclosure was intended or is justified.<sup>6/</sup> For example, a person seeking PUC approval to operate a small local trucking company might incur reporting requirements as might an individual seeking Coastal Commission approval for construction of his own residence. To be sure, there are certificate, permit or other entitlement decisions which, although involving only a single applicant, still have a wide public impact because of the nature of the project involved. Because of that impact, there is an interest in disclosure of activity aimed at influencing that decision. The Southern Pacific commuter train decisions fall into this category. But it is our opinion that the purpose of the Act in drawing the line between quasi-legislative and quasi-judicial action was to limit disclosure to activity aimed at influencing those decisions which, by their very nature, are most likely to be applicable to classes<sup>7/</sup> of persons or situations, not just an individual applicant.<sup>7/</sup> In certain cases such a dividing line may require disclosure where there is no great interest in disclosure and dispense with disclosure where there is a great interest in disclosure. However, we believe that as a general matter, the dividing line we have articulated here will work to require disclosure in those situations where it is most useful because of the wide applicability of the administrative decision, yet limit disclosure where it is least useful because of the narrow applicability of the decision.

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<sup>6/</sup> However, as we point out in our answer to question 3, certain certificate proceedings such as the Southern Pacific one become "administrative action" if combined with other kinds of proceedings.

<sup>7/</sup> There are decisions which are denominated quasi-legislative which, as a practical matter, affect only a single person. See, e.g., opinion requested by Carl Leonard, 2 FPPC Opinions 54 (No. 75-042, Apr. 22, 1976) where the Commission decided that proceedings of the PUC to adopt safety regulations were quasi-legislative despite the fact that the regulations applied only to the Bay Area Rapid Transit District. In the situation of the Leonard opinion as well as occasional other regulatory situations, the rules or regulations are legally binding upon any person who falls into the class defined by the regulation even though only one person may be in that class at the time the regulations are considered or adopted. Because of the class effect of the regulations, they are held to be quasi-legislative despite present application to only one person. In contrast, entitlement decisions are only binding upon the person seeking the entitlement.

(2) In contrast to the certificate decisions discussed above, the PUC's proceeding concerning the Southern Pacific's commuter service instituted pursuant to an Order Instituting Investigation ("OII") must be considered quasi-legislative.

In many cases, the OII is the means used to begin a formal disciplinary proceeding against a person alleged to have violated a tariff, rule, regulation or statute enforced by the PUC. See Public Utilities Code Section 1705. Such a disciplinary proceeding would be considered quasi-judicial and is specifically excluded from the definition of "administrative action" by 2 Cal. Adm. Code Section 18202(a)(3). But in this particular case the OII is being used as a means of conducting a general appraisal of Southern Pacific's commuter service. The purpose of the proceeding is to investigate the reasonableness or adequacy of rates, rules, and regulations applicable to commuter train operation.<sup>8/</sup> We believe that any time there is a reasonable possibility that a proceeding instituted pursuant to an OII will involve consideration of adoption or changes in rules and regulations of general application or rates, the<sup>9/</sup> OII proceeding should be considered administrative action.<sup>9/</sup> As we have noted in our answer to the first question, rate, rule and regulation proceedings are specifically included in the Act's definition of administrative action. Section 82002.

(3) In the particular case of the PUC's proceedings concerning Southern Pacific's commuter operations, the application for discontinuance of service has been combined with the OII proceeding.<sup>10/</sup> Mr. Evans asks whether the consolidation of the two proceedings makes the certificate aspect of the proceeding administrative action.

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<sup>8/</sup> Order Instituting Investigation No. 10380  
July 26, 1977.

<sup>9/</sup> A proceeding does not become administrative action merely because it is carried out pursuant to an OII. As pointed out in the text, disciplinary proceedings pursuant to an OII are not administrative action. There also may be other OII proceedings which do not constitute administrative action because they do not involve rules, regulations, rates or other quasi-legislative acts.

<sup>10/</sup> The application was filed on May 9, 1977. The OII was issued on July 26, 1977, and that order combined the application with the OII proceedings.

Once the two proceedings are combined, we believe that the entire combined proceeding should be considered to be administrative action. We reach this result because, as a practical matter, it will not be possible to isolate what expenses are attributable to attempting to influence that part of the proceeding which involves consideration of rules and rates and that part which involves the certificate. In all likelihood most information and testimony submitted to the PUC in connection with the combined proceedings will serve the dual purpose of attempting to influence the certificate decision and decisions concerning rules, regulations and rates that arise out of the OII aspect of the proceeding.<sup>11/</sup>

Approved by the Commission on November 8, 1978.  
Concurring: Lapan, Lowenstein, McAndrews and Quinn.  
Commissioner Remcho was absent.

  
Daniel H. Lowenstein  
Chairman

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<sup>11/</sup> There may be instances where several proceedings are formally combined but are not combined for hearing and decision. In such a situation the constituent proceedings may remain separate. Under those circumstances, the fact that one of the constituent proceedings is administrative action would not necessarily convert another of the constituent proceedings into administrative action.